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80-1733

No.

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

JOHN P. OHL,

Petitioner,

v.

LILLIAN M. OHL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL, OF FLORIDA

JOHN P. OHL
Attorney For Petitioner (Pro Se)
113 E. Inlet Drive
Palm Beach, Florida 33480

Of Counsel:

H. RICHARD SCHUMACHER
80 Pine Street
New York, New York 10005

EDNA L. CARUSO
Suite 1007—Forum III
1655 Palm Beach Lakes Blvd.
West Palm Beach, FL 33401

QUESTIONS PRESENTED

1. Did the Florida courts, in making a property award as part of a divorce decree, deny to Petitioner (Husband) the due process of law guaranteed by the Constitution's Fourteenth Amendment, as construed in such cases as *In re Marriage of Roesch,* 83 Cal. App. 3d 96, 147 Cal. Rptr. 586 (1st Dist. 1978), by granting to Wife, a resident of a foreign country and a person of substantial means found to be without "need", an interest in real and personal property located in the State of New York which the Husband had acquired and owned for some 30 years, as his sole property in that State?

2. Did the Florida courts, by awarding as part of a divorce decree, attorney's fees to a Wife whom the Florida courts had found to be without need, make a sexually discriminatory award which denied to Petitioner (Husband) equal protection of the laws under the Fourteenth Amendment as construed in *Orr* v. *Orr,* 440 U. S. 268 (1979); *Childs* v. *Childs,* 440 U. S. 952 (1979); and *Loyacano* v. *Le Blanc,* 440 U. S. 952 (1979)?

3. Did the Florida courts deny to Petitioner (Husband) his right, granted by the Fourth and Fourteenth Amendments of the Constitution, to be "secure" in his "papers and effects", by permitting the Wife to enter into evidence at a divorce trial documents which she had stolen from him?

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No.

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JOHN P. OHL,

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PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL, OF FLORIDA

Petitioner JOHN P. OHL respectfully prays that a writ of certiorari issue to review a decision of the Fourth District Court of Appeal of Florida which affirmed, *per curiam*, without opinion (13a)* a Final Judgment of Dissolution of Marriage entered by the Circuit Court of the Fifteenth Judicial Circuit of Florida, in and for Palm Beach County on August 20, 1979 (1a-12a).

The trial court's Final Judgment granted petitioner a divorce from his wife (10a), found that she "ha[d] no 'need' " and denied her alimony in any form, and denied her "a special equity or any valid claim in or to the husband's Palm Beach, Florida home" (4a). The decree, nevertheless, granted the wife a 40% interest in two parcels of residential real estate, the former marital home, owned by petitioner in the State of New York (8a-9a), granted the wife a 50% interest in furnishings and other personalty owned by petitioner and acquired for use and located in the New York

* "__a" refers to pages of the appendix of decisions below which appears following the text of this petition.

residences (9a), and directed husband to pay $21,500 of the wife's counsel fees and costs (13a).

Each of these awards against petitioner involved violations of the Fourteenth Amendment to the federal Constitution. They raise, we submit, significant questions about how the protections of that amendment are to be applied to divorcing spouses who, by the time of their divorce, both have moved from their original State of marital domicile.

The Fourth District Court of Appeal denied rehearing to its affirmance of the trial court on January 16, 1981 (37a).

OPINIONS BELOW

The trial court's Final Judgment of Dissolution of Marriage ("the Judgment") dated August 20, 1979 appears in the appendix at pp. 1a-12a. Its further order with respect to attorneys' fees, dated September 12, 1979, appears at pp. 13a-14a. Both sides appealed. Florida's Fourth District Court of Appeal, affirmed in a *per curiam* order dated December 10, 1980, which appears at pp. 15a. The latter court also denied on January 16, 1981, again without opinion, the petitions of both parties for rehearing. This ruling is set forth at p. 37a.

On February 25, 1981, the Supreme Court of Florida rejected, for want of jurisdiction (44a), a petition by the present petitioner seeking to invoke the discretionary jurisdiction of that court (39a). None of the foregoing decisions has been reported.

JURISDICTION

The decision of Florida's Fourth District Court of Appeal affirming, without opinion, the Final Judgment of the trial court was entered on December 10, 1980 (15a), and the Court of Appeal's decision denying rehearing was entered on January 16, 1981 (37a). That court is the highest court of Florida in which review could be had by reason of the further ruling of the Supreme Court of Florida, entered February 27, 1981, holding that it lacked jurisdiction to review. This Court's jurisdiction is invoked pursuant to 28 U. S. C. 1257(3)(1976).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This petition invokes Section 1 of the Fourteenth Amendment of the Constitution of the United States, the Fourth Amendment which is made applicable to the States by the Fourteenth Amendment, and various provisions of the statutes of Florida relating to divorce. They are reproduced in a statutory appendix at the back of this volume.

STATEMENT OF THE CASE

Petitioner and respondent ("Husband" and "Wife", respectively) married in 1932, lived all their married lives in the State of New York, and separated in 1968. Both continued to reside in New York until 1975-1976, when the Wife moved to the Cayman Islands, a British colony in the Caribbean, and the Husband to Florida (3a-4a). At the time of the final trial hearing in the Florida divorce proceedings the parties had been separated for over 10 years, during which time the Wife had supported herself, in full, from her substantial independent means (3a). Both Husband and Wife were 70 years of age. The four children born of their marriage all were adults with their own independent means (2a).

More than two years after taking up domicile in Florida, the Husband filed in the courts of that State for dissolution of the marriage. The Wife appeared and was represented by counsel throughout the ensuing proceedings (1a). At the time Husband initiated his action for divorce, his property included residential realty in Nassau County, New York, which he had purchased and owned for over 30 years, and which, at one time, had served as the parties' marital home (4a). His property included, as well, various items of antique furniture and art intended for use in, and used in, the New York residence, which he had bought and paid for, from time to time, during the marriage (20a).

The divorce requested by petitioner was granted under Florida's "no-fault" divorce statute, Fla. Stat. Ann. § 61.001 *et seq.*, (West 1969 & Supp. 1981), because, the trial court found, "the marriage is irrevocably broken" (10a). At the time of dissolu-

tion, the Wife had a net worth in excess of $2,000,000 (19a) and the Husband a net worth of over $1,000,000 (21a). The Wife testified at trial that she had "no need" (19a), and the trial court specifically so found (4a).

The Wife, nevertheless claimed and was granted a "special equity" (*i.e.*, a property interest) in Husband's New York realty and furnishings and art objects, notwithstanding the fact she admitted that she had no proof to support any "special equity."* Prior to the trial, the Husband filed a Motion in Limine to preclude the Wife from using at the trial confidential private documents which she had stolen from him which purported to support a claim to a "special equity". The Motion was held in abeyance until the time of the trial on the representation of Wife's counsel that the information might not be used. Notwithstanding, the documents were offered at the end of the trial, and the trial court received the documents into evidence. They are the only evidence upon which an award to the Wife of a "special equity" in the New York realty can be predicated.**

The Wife also claimed an interest in the many antiques and works of art which the Husband had purchased, and paid for, for use in the couple's one-time Long Island home. She acknowledged that she had not contributed any monies toward their purchase, but nevertheless, the trial court awarded one-half to the Wife (9a).***

In the face of its finding that the Wife, by reason of her concession and substantial wealth, had no "need", the trial court

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* "The term 'special equity' was created (in the law of Florida) to describe a vested interest in property brought into the marriage or acquired during the marriage. . . . This vested interest is *not* alimony." *Canakaris* v. *Canakaris,* 382 So.2d 1197, 1200 (Fla. 1980) (emphasis in original).

** The documents properly construed do not create an interest in the Wife—a moot point if they are properly excluded.

*** The trial court found that the Wife had purchased other items of furniture. These were awarded to the Wife, and objection to that award was raised here.

also awarded the Wife $21,500 in attorney's fees and costs (14a). Under the governing Florida divorce statute, Fla. Stat. Ann. §§ 61.16 (West Supp. 1981), which is, on its face, gender neutral, an award of attorney's fees to a "party" must be based upon a finding as to that party's "need". Under such circumstances, the attorney's fee award in this case was sex based, a grant to the Wife because she is a woman. She was entitled, in the Florida court's view, to a stereotyped award of the kind which, in the past, routinely had been granted to wives in divorce proceedings by reason of their sex alone.

There is, we submit, no warrant in the Fourteenth Amendment for requiring a husband to pay a wife's attorney's fees in a divorce action when she is fully able to bear them herself and when, as here, they were occasioned, not by her need to pursue protection from post-marital need, but simply to wage a struggle to augment her already substantial personal wealth.

The objection to the use of the stolen papers on federal constitutional grounds was raised by pre-trial motion (25a-26a). The other federal constitutional issues presented herein arose out of the trial court's judgment and were presented in petitioner's applications addressed to the Fourth District Court of Appeals (28a, 33a, 35a) and the Petition to Invoke Discretionary Jurisdiction to the Florida Supreme Court (40a-43a).

REASONS FOR GRANTING THE WRIT

By making in the face of petitioner's Fourteenth Amendment claims, the awards to the Wife here challenged, Florida's Fourth District Court of Appeal has decided important questions of due process and equal protection regarding the property rights of parties to a marriage in which both divorcing parties have moved from the State of original marital domicile. Marital dissolutions of this kind are becoming an increasingly frequent phenomenon in this country. Review is required to bring the Florida Courts into line with recent decisions of this Court and to establish authoritative guidelines for the resolution of situations which are arising regularly in domestic relations jurisprudence across the United States.

(1) A change of domicile by one or both spouses from one State to another State (or, as here, to a foreign country) should not affect or change the character of property acquired by either party prior thereto. Once an individual's rights in property becomes fixed by the laws of the State in which the property was acquired and located, that person is denied due process if those rights can be altered by reason of a divorce decree of a court of another State.

A case addressing the constitutional issue here raised is *In re Marriage of Roesch,* 83 Cal. App. 3d 96, 147 Cal. Rptr. 586, (1st Dist. 1978), involving parties who had lived in Pennsylvania during coverture. When the parties later separated, the husband moved to California, a community-property State. Under Pennsylvania law, certain assets which the husband had acquired during the marriage and while he lived in Pennsylvania were his separate property. Applying California's community-property law, the trial court held that all of the parties' property must be equally divided.

The California appellate court reversed, holding that property acquired by a spouse during the marriage while domiciled in one State could not lose its character as the separate property of that spouse upon a change of domicile to a State which would allow the non-acquiring spouse an interest in the property. The appellate court held that a change in the character of the property could not constitutionally be applied retroactively to impair "vested interests" unless both parties had changed their domicile to California and sought divorce there.

Unless both these conditions exist, the interest of the State of removal in the status of the property is insufficient to justify reclassification without violating the due process clause of the Fourteenth Amendment and the privileges and immunities clause of Article IV, Section 2 of the federal Constitution. Additionally, reclassification based upon a mere change of domicile would abridge the privileges and immunities clause of the Fourteenth Amendment.

Many additional cases to the same effect are collected in Annot., Change of Domicile as Affecting Character of Property Acquired as Separate or Community Property, 14 ALR 3d 404 (1967). For example, in *John* v. *Commissioner,* 88 F.2d 952 (8th Cir. 1937), *on appeal after remand,* 105 F.2d 454 (8th Cir. 1939), *cert. denied,* 308 U.S. 625 (1940), it was held property did not lose its character as community property when removed to a common-law State.

In the present case, only petitioner moved to Florida. Mrs. Ohl moved to the foreign jurisdiction of the Cayman Islands. Accordingly, Florida did not have the requisite interest required to assert over the property the jurisdiction that its courts did. Equal protection of the law cannot exist because the Florida Courts have no jurisdiction (are without power) over the Wife's Cayman Island properties (real and personal).

As to the realty involved in this case, New York was a so-called "title" state. The title to the realty in which a Flordia court awarded Mrs. Ohl a "special equity" had been solely her husband's for 30 years. Under New York law the realty, being titled in Mr. Ohl, belonged to him. And before the parties departed from New York the Wife's rights were barred. *Scheurer* v. *Scheurer,* 308 N.Y. 447, 126 N.E.2d 555 (1955).

Similarly, under New York law, if personal property (here household furnishings and art works) had been paid for by the husband, the fact that the wife participated in selection of such property and that the property was intended to be, and was, used by the couple in their family home, does not give rise to a joint ownership which entitles the Wife, upon dissolution of the marriage, to an undivided one-half interest in the property. *Manheim* v. *Manheim,* 60 Misc. 2d 88, 302 N.Y.S. 2d 473 (Sup. Ct. Nassau Co. 1969), *aff'd mem.,* 310 N.Y.S. 2d 1017 (2d Dep't 1970). That case specifically held that mere common possession of marital property would not result in joint ownership. To the same effect is *Kroul* v. *Kroul,* 42 A.D. 2d 584, 344 N.Y.S. 2d 702 (2d Dep't 1973) (mem.).

In the present case, the Florida courts had no jurisdiction to transfer to the Wife the Husband's property (real or personal) which he had acquired in New York and owned it under New York law before he changed his domicile to Florida. *See, e.g., New Jersey* v. *Moriarity,* 268 F.Supp. 546 (D.N.J. 1967). While we recognize that the Florida court had jurisdiction to award alimony, and might have made orders for the disposition of the petitioner's property to satisfy such an award, the Florida courts explicitly found that they had no basis for making such an award in this case. The decretal provisions in issue can be explained only as an attempted assertion by the Florida court of an *in rem* jurisdiction over the marital parties' property wherever situated. Such an assertion cannot, we submit, be squared with the fundamental assumptions of our federalism. This Court should decide, we submit, whether this assault is permissible under the Fourteenth Amendment.

(2) The Florida courts' award of attorney's fees to the Wife cannot be reconciled with *Orr* v. *Orr,* 440 U.S. 268 (1979); *Childs* v. *Childs,* 440 U.S. 952 (1979); or *Loyacano* v. *Le Blanc,* 440 U.S. 952 (1979). *Orr* held unconstitutional the Alabama statute providing that the wife (but not the husband) could be awarded attorney's fees. *Childs* and *Loyacano* held to the same effect as to the divorce statutes of New York and Louisiana, respectively.

Unlike the statutes at issue in those cases, the relevant Florida statute, Fla. Stat. Ann. § 61.16, is, in terms, gender neutral since it provides that "a party" may be ordered to pay the other spouse's attorney's fees and costs upon a showing of need. *See also Turner* v. *Turner,* 383 So.2d 700 (Fla. 4th Dist. Ct. App. 1980). But, on the found facts of the present case, the Florida enactment plainly has been applied in a sexually discriminatory and unconstitutional way. The Wife's net worth exceeds two million dollars (19a), her U.S. income tax return for one year alone (1970) showed a taxable income of $190,720. She admitted and the trial court found "no need". The Florida court's

order to the Husband to pay $21,500 to the Wife as attorney's fees and costs is an exercise in judicial "chivalry" which, this Court's holdings make clear, the Florida courts cannot constitutionally indulge at petitioner's expense.

(3) The Florida courts permitted the Wife's use as evidence at trial of "papers" (documents) stolen by the Wife in New York and taken to Florida for use in the Florida divorce proceedings (26a). This, we submit, denied the Husband his rights guaranteed by the Fourth and Fourteenth Amendments, to be secure against the seizure of his "papers and effects" which the Constitution decrees "shall not be violated".

This case frames, clearly, a question significant to Fourth Amendment jurisprudence which this Court now should address, *viz.*, whether the exclusionary rule of *Mapp* v. *Ohio*, 367 U.S. 643 (1961), should be applied to civil, as well, as criminal proceedings? While many courts have suggested that the answer to this question is "no", others, recognizing the broad scope of this fundamental right of all citizens, have taken a contrary view. *See, e.g., Williams* v. *Williams*, 8 Ohio Misc. 156, 221 N.E.2d 622 (Ohio Common Pleas 1966), *Kohn* v. *Superior Court*, 55 P.2d 1186 (Cal. App. 1936).

In *Mapp*, 367 U.S. at 655 the Court observed:

> "Only last year the Court itself recognized that the purpose of the exclusionary rule is to deter—to compel respect for the Constitutional guaranty in the only effective available way—by removing the incentive to disregard it. *Elkins* v. *United States, supra*, 364 U.S. at p. 217, 80 S.Ct. at p. 1445."

In *United States* v. *Janis*, 428 U. S. 433 (1976), a divided Court recognized the disparity of views concerning the exclusionary rule and termed the continuing debate surrounding it a "warm one". (*Id.* at 446.) The instant case provides a vehicle for the resolution of this important issue.

CONCLUSION

This case poses issues which are of growing importance to American jurisprudence as the number of divorces rises and as the citizens of an increasingly mobile society move, ever more frequently, from one State to another. The writ should issue so that this Court may address and decide them.

Respectfully submitted,

JOHN P. OHL
Attorney For Petitioner (Pro Se)
113 East Inlet Drive
Palm Beach, Florida 33480

Of Counsel:

H. RICHARD SCHUMACHER
80 Pine Street
New York, N. Y. 10005

EDNA L. CARUSO
Suite 1007—Forum III
1655 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33401
April 16, 1981

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* The "societal costs" imposed by exclusion are not present in this, a divorce case. (428 U. S. at 454.)

Decision Below

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FINAL JUDGMENT OF DISSOLUTION

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY

CASE NO. 78 1441 CA (D) 03 G

IN RE: THE MARRIAGE OF

JOHN P. OHL,

Husband,

and

LILLIAN M. OHL,

Wife.

_____/

FINAL JUDGMENT OF DISSOLUTION OF MARRIAGE

This matter was tried upon the husband's petition for dissolution of marriage and the wife's answer and counterclaim. The parties appeared with counsel. The court heard testimony of the parties and their witnesses, and, having considered the evidence, testimony and memoranda of counsel, finds as follows:

A. This court has jurisdiction over the subject matter and the parties. The court finds the marriage is irretrievably broken.

B. The parties were married in 1932. They have been separated for the past ten (10) years, and each has lived upon his or her separate resources for the entire period of the separation. Neither has requested financial assistance from the other during this separation.

C. The parties had four (4) children, all of whom are now adults. The wife was a full-time homemaker and cared for the children until approximately 1967, when the youngest of the children reached 21 years. During the marriage before the separation, the wife made contributions to the husband's career by entertaining his partners, associates and

clients, and by participating in charitable affairs.

D. The husband was, and is, a successful attorney, which enabled the family to enjoy a relatively high standard of living. The husband resigned from active practice in 1975, due partially to poor health. The wife has enjoyed relatively good health during the entire period of the marriage including the separation.

E. During the long-term separation, the wife lived comfortably upon income derived from her own assets and from income derived through a vested life estate in two substantial trusts. She has, without financial assistance from her husband, bought land and built a home in the Cayman Islands valued at $185,000 and purchased a valuable yacht. While the husband has the ability to pay a reason-

able award of alimony, the court finds the wife has no "need" for such an award. The court, after consideration of the criteria in F.S. 61.08 as amended, concludes the wife's failure and ability to demonstrate need (along with her admission of no need) require the court deny her claim for alimony in any form.

F. The wife failed to establish a special equity or any valid claim in or to the husband's Palm Beach, Florida home nor his interest in the Paradise Ranch, Limited partnership. The husband holds record title in his sole name to a residence and adjoining acreage in Sands Point, Town of Hempstead, County of Nassau, in the State of New York:

> BEGINNING at a point in the center line of a certain private right of way which extends westerly from the lane dividing

the property of the North Shore-Sands Point Corporation from the property of Daniel Guggenheim, which land leads northerly from the Middle Neck Road; which said point of beginning is distant westerly 311.51 feet measured along the center line of said right of way from the intersection of the center line of said right of way with the center line of said lane and which point of intersection is distant 1812.93 feet northerly from the Middle Neck Road as measured along the center line of said lane; running thence south 17 degrees 25 minutes west 677.21 feet; thence north 74 degrees 46 minutes 25 seconds west, 325 feet; thence north 15 degrees

25 minutes east 626.67 feet to the center line of the aforesaid right of way; thence south 87 degrees 37 minutes 01 seconds east along the center line of said right of way, 191.64 feet to a point of curve in said center line; thence southerly still along said center line on a curve with a radius of 457.264 feet a distance of 162.99 feet to the point or place of beginning.

and adjoining acreage legally described as:

BEGINNING at a point in the center line of a certain road or lane leading northerly between the premises herein described and other premises now or formerly of Daniel Guggen-

heim on the east, from the highway leading from Sands Point to Roslyn, now known as Middle Neck Road, said point being distant 1171.53 feet from said Middle Neck Road, as measured along said line of said lane; running thence north 28 degrees 30 minutes 2 seconds east 45.02 feet; thence north 31 degrees 45 minutes 52 second east, 93.76 feet; thence north 22 degrees 12 minutes east 324.12 feet; thence north 12 degrees 41 minutes 16 seconds west 131.75 feet; thence north 43 degrees 37 minutes 40 seconds west, 46.75 feet to the center line of a certain other road or lane leading westerly between premises herein described and other premises on

the north, which prior to May 12, 1932, belonged to North Shore-Sands Point Corporation, the preceding five (5) courses being along the center line of said first mentioned lane; thence north 58 degrees 51 minutes 49 seconds west along the center line of said last mentioned road, 245.03 feet; thence still along said center line on a curve the radius of which is 457.26 feet, 66.48 feet to a point; thence south 17 degrees 25 minutes west 677.21 feet; thence south 74 degrees 46 minutes 25 seconds east, 351.88 feet to the point or place of beginning.

The court finds the wife is clearly and convincingly entitled to a special equity

of 40% in the Sands Point residence and adjoining acreage.

G. The wife is not entitled to a further accounting from the husband as requested by her counterclaim.

H. The parties own valuable antiques and furnishings in the Sands Point, New York residence and in storage, the bulk of which are scheduled on an appraisal submitted into evidence. The court finds the wife owns individually those items circled on the appraisal, and the remainder belong to the parties jointly. The parties shall divide the joint property, if they can, in whole or in part, between themselves. The remaining part shall be sold within a reasonable time and the net proceeds divided equally between the parties. Any personal property not included in the appraisal belongs to the party who acquired it.

It is therefore ORDERED AND ADJUDGED:

1. The bonds of matrimony between the parties are dissolved because the marriage is irretrievably broken.

2. The wife's prayer for alimony is denied.

3. The wife's prayer for an accounting is denied.

4. The wife's claim for a special equity in the husband's Palm Beach, Florida home is denied as is any claim to the husband's interest in the Paradise Ranch Limited partnership.

5. The wife's claim for a special equity in the Sands Point, New York property is granted, and she is hereby awarded a 40% undivided interest in the Sands Point, New York property as previ-

ously described in this judgment. From July 1, 1979, the wife shall be responsible for payment of 40% of the operating expenses for this property.

6. The wife owns individually and is entitled to all of the circled items on the appraisal of the parties' furnishings and contents. The parties shall own jointly all items of personal property on the appriasal not circled. The parties are directed to divide these items to their mutual satisfaction within forty-five (45) days from the date of this judgment. If not, the remaining items shall be sold at public or private sale, and the net proceeds equally divided.

7. The court reserves jurisdiction for the purpose of considering the wife's attorney's fees and costs, if any, after motion with notice.

8. The court reserves jurisdiction to enforce this judgment, and the parties are directed to take such action as is reasonable and necessary to carry out the intent and purpose of this judgment.

DONE AND ORDERED at West Palm Beach, Florida, this 20th day of August, 1979.

Thomas E. Sholts,
Circuit Judge

Copy furnished:

Paxton, Crow, Taplin
& Bragg, P. A.

O'Connell & Cooper

ORDER ASSESSING ATTORNEYS' FEES AND COSTS

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY

JUVENILE AND FAMILY DIVISION
CASE NO. 78 1441 CA (D) 03 G

IN RE: THE MARRIAGE OF]

JOHN P. OHL,]

Husband]

and]

LILLIAN M. OHL,]

Wife]

ORDER ASSESSING ATTORNEYS' FEES AND COSTS

THIS CAUSE came on to be heard before the Court upon the application of the wife for attorneys' fees and for the assessment of costs, and the Court having heard evidence and argument of counsel, finds as follows:

1) Wife is entitled to an award

of attorneys' fees in the amount of the reasonable value of her attorneys' services, which the Court herein finds to be the sum of $21,500.00.

2) Wife is entitled to the assessment of her costs to the extent of $5,890.05.

IT IS THEREUPON

ORDER AND ADJUDGED that the Husband, JOHN P. OHL shall pay to the Wife, LILLIAN M. OHL the sum of $21,500 for legal services rendered in this cause to her, and the sum of $5,890.05 as her assessable costs, for a total of $27,390.05, for which let execution issue.

DONE AND ORDERED at West Palm Beach, Palm Beach County, Florida, this 12th day of September A.D. 1979.

Thomas E. Sholts, Circuit Judge

DECISION OF THE FOURTH DISTRICT COURT OF APPEAL DATED DECEMBER 10, 1980 AFFIRMING THE FINAL JUDGMENT OF DISSOLUTION

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT

JULY TERM 1980

LILLIAN M. OHL, Appellant/Cross-Appellee	)	
v.	)	CASE NO. 79-2121
JOHN P. OHL, Appellee/Cross-Appellant.	)	
JOHN P. OHL, Appellant/Cross-Appellee,	)	
v.	)	CASE NO. 79-2143
LILLIAN M. OHL, Appellee/Cross-Appellant.	)	

Decision filed December 10, 1980

Consolidated appeals and cross-appeals from the Circuit Court for Palm Beach County; Thomas E. Sholts, Judge.

H.L. Cooper, Jr., of O'Connell Cooper, Parrish & McBane, P.A., West Palm Beach, for Lillian M. Ohl.

Paxton, Crow, Taplin & Bragg, West Palm Beach, and Edna L. Caruso, West Palm Beach, for John P. Ohl.

PER CURIAM.

AFFIRMED.

LETTS. C.J., BERANEK and HERSEY, JJ., concur.

PETITIONER'S PETITION FOR REHEARING
ADDRESSED TO THE FOURTH DISTRICT
COURT OF APPEAL.

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA

FOURTH DISTRICT

CASE NOS.: 79-2123

79-2143

LILLIAN M. OHL,

Appellant/Cross-Appellee,

v.

JOHN P. OHL,

Appellee/Cross-Appellant.

_____/

PETITION FOR REHEARING
AND PETITION TO CERTIFY QUESTIONS
TO THE FLORIDA SUPREME COURT

JOHN P. OHL, Appellee/Cross-Appellant, files this Petition for Rehearing and Petition to Certify Questions to the Florida Supreme Court and as grounds therefor would show unto the Court as follows:

No Equitable Imbalance

No equitable imbalance will be created if the Court affirms (as it has done) the finding of no alimony by reason of "no need"(1) and yet reverses the finding of a special special equity of 40% in the Husband's New York real property and a 50% in the balance of the Husband's New York personal property by reason of a failure to prove a right thereto either "beyond a reasonable doubt" or by "clear, convincing and unambiguous" evidence. Also reversing the allowance of counsel fees and costs as a consequence of "no need" or shown "inability to pay" will create no equitable imbalance.

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(1) R. 1470 quoted at p. 2 of the Husband's Main Brief.

At the November 25, 1980 argument, members of the panel posed questions to counsel raising the question that if the Court were to affirm the refusal to grant alimony and were to reverse the finding of the Wife's special equity and the granting of counsel fees and costs - would the Court not have to remand the entire matter?

Our answer then and now is NO. As we have pointed out no equitable imbalance will result.

The reason is that the Wife's admission in her parol testimony(2) that for ten years she had had "no need" was predicated upon her sworn financial affidavits and the evidence clearly showed she had financial resources of $2,161,000(3).

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(2) Summarized in Appendix 6 to the Husband's Reply Brief.

(3) P. 12 Husband's Main Brief.

The special equity argument pro and con is whether she shall have $184,000 more[4] for her alleged (but not proved ed) special equity in her Husband's New York real estate and $60,000[5] more (on top of $65,000 already conceded)[6] of her Husband's New York personal property. In short, the Husband's New York assets to the extent of $244,000 have been ordered transferred to his wife so her financial resources will be increased to $2,470,000.

We claim $244,000 more is too much - in any event.

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(4) See Tabulation, p. 12 Husband's Main Brief.

(5) Husband's Main Brief, p. 11 and footnote 9.

(6) Mrs. Ohl's testimony, "You may put that down" (T235): Includes the 225 items conceded to shorten the trial valued at $65,000 but not to be found in the Wife's affidavit, but on cross examination she conceded that the $65,000 amount should be added.

The ordered special equity transfers necessarily reduce the Husband's resources from $1,399,854 to $1,090,854[7].

The real point is that the Wife admitted her net worth was such that she had no need[8]. Under these circumstances neither the Trial Judge nor this Court can properly find a legal basis for taking $244,000 from the Husband and transferring it to the Wife - when she had no need therefor.

The case presented is really one where enough has been admitted to be

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(7) Even if there is to be added ($394,200) Mr. Ohl's future "pension" income (without offsetting future expense) claimed (but vigorously denied) to be added to his assets his net worth would be $1,485,054 as compared with his Wife's resources of $2,470,000, or almost $1,000,000 more! (Appellee's Brief, pp. 9-17).

(8) The Wife's financial affidavits did not include either the real estate nor the personal property so claimed.

enough but ($244,000) more is too much! Therefore, no equitable imbalance will be created if the "more" (special equity items) are not added to the Wife's already sufficient financial resources.

A Lack of Due Process

To date there has been a lack of due process[9] which will result in a gross miscarriage of justice. While the parties cross-appealing have had their "day in Court", the "decisions" handed down are devoid of any reason explaining the result to either party. No rule of law

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(9) Procedural as well as substantive: Even in a community property state (Calif.) In Re Marriage Of Roesch, 83 Cal.App. 96 "when both of these conditions exist [including change of domicile to Calif.] the interest of the State of California in the status of the property is insufficient to justify reclassification without violating the due process clause of the Fourteenth Amendment and the privilege and immunities clause of Article IV, Section 2 of the Federal Constitution."

has been stated to have been applied, nor has one case been cited at either the trial or appellate level to justify the result.

We are all enjoined to live by the rule of law. But what rule? No one can learn in this case what rule of law has been applied to the facts. Prior cases are supposed to have precedential value and the doctrine of stare decises to have force. We are at a loss to know what case or cases are relied on, followed or overruled.

As no opinion has been forthcoming, applying some rule of law to the facts and no precedent (case) is cited how is the litigant's "right to know"(10) sat-

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(10) If under the First Amendment reporters have a right to let the public know (Time, Inc. v. Hill, 385 U.S. 374 [1967]) a fortiori the litigants themselves have a right to know.

isfied? The application of no rule of law, the citation of no case - leaving only the result known (here unsatisfactory to both parties to the cross appeals) has the (unintended) result of arbitrariness[11]. The pronouncement of the ratio dedecendi resolving a case elimminates any appearance of arbitrariness. Moreover, without a written opinion no litigant can seek a review by an application to the Supreme Court of Florida for further enlightenment.

The Courts are required to adjudicate rights by due process of law.

"Accordingly, a most important element of protection afforded by the due process clauses of the State and Federal Constitutions is procedural due process." 10 Fla.Jur.2d 3368 (p. 531).

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(11) Why 40%? Why not 30%, 20% or 10%? There is no rational explanation offered here.

We understand the rule of the law (and the Constitution) requires in special equity cases under the doctrine of stare decises that the claiming party (here the Wife) prove beyond a reasonable doubt that her funds were used to acquire the property (or her 40% or 50% interest therein) whether real or personal property.

We submit, no judicial answer has so far been given.

We submit, that where the Wife states she has "no proof"[12] of special equity that should have ended the matter. However, the trial judge, in spite of a motion to preclued made before the

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(12) See the Wife's testimony extracted in Appendix 4: "A. I have no documents whatsoever." and "No, I do not. I have no proof of any kind."

trial[13] which was not decided but postponed on the Wife's counsel's statement that he would probably not use such evidence anyhow, admitted confidential private documents[14] toward the very end of the trial. Before this Court the Wife's only evidence now urged to support the finding of a special equity below rests on stolen evidence[15].

Even if admissible, the documents properly analyzed do not support the re-

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(13) R.1198-1199.

(14) Article 1, Declaration of Rights, Section 12, Searches and Seizures, Constitution of the State of Florida, 1968, F.S.A., provides in part:

> "The right of the people to be secure in their persons, houses, papers, and effects . . . against the unreasobable interception of private communications, by any means, shall not be violated."

(15) "Yes, I sure did" (R1145). Cf. Wife's Brief, page 31, no evidence only Husband's own testimony. Downright misleading.

sult claimed. No judge has said, whether and if so, how, the stolen documents support taking the Husband's properties always located in New York away from him and turning them over to the Wife.

While no Florida case expressly dealing with a case of stolen documents has been found (and the instant case may be, in this regard, one of first impression) at least two other state Courts have barred the use of such evidence(16). Otherwise, the result is to put a premium on stealing(17).

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(16) Williams v. Williams, 221 N.E. 2d 622 (Ohio, Common Pleas 1966) and in California Kohn v. Superior Court, 12 Cal.App.2d 459, 55 P.2d 1186 (Cal. 1936).

(17) Cf. The Supreme Court opinion in a criminal case: Mapp, 367 U.S. at 655 "Only last year the Court itself recognized that the purpose of the exclusionary rule is to deter -- to compel respect for the Constitutional guaranty in the only effective available way -- by removing the incentive to disregard it. Elkins v. United States, supra, 364 U.S. at p. 217, 80 S.Ct. at p. 144".

There is no way the Wife has proved her special equity claim "beyond a reasonable doubt" - let alone by "clear, convincing and unambiguous" evidence.

Without explanation in the instant case the result here overrules sub-silentio all previous special equity precedents.

Counsel Fees

In the neuter-gender world recently decreed by the U.S. Supreme Court in dealing with payment of attorney fees in matrimonial actions[18], the Florida Statute 61.16 read, as it must be, in a neuter-gender manner, requires, we sub-

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(18) Orr v. Orr, 440 U.S. 268 (1979), holding unconstitutional the Alabama Statute on the Husband being responsible for the Wife's counsel fees and Childs v. Childs, 440 U.S. 952 (1979), holding unconstitutional the New York Statute making the Husband likewise responsible for the Wife's counsel fees.

mit, each spouse to discharge their respective legal costs and expenses if they were financially able to do so. It is unconstitutional to decree otherwise. Here the Wife's worth is upward of two million dollars and her U.S. Income Tax Return for one year alone (1976) shows taxable income of $190,720[19], yet she has been relieved of paying $21,500 of her own fees to her duplicative attorneys and the Husband has been ordered to do so.

The case law and the doctrine of stare decises has been overruled sub-silentio[20]. The illogical result is

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(19) In addition she has so called tax-free income. Pl. Ex. No. 15. Husband's Main Brief p. 7.

(20) The Court's decision here directly conflicts with Turner v. Turner, 383 So.2d 700 (Fla.4th DCA, April 30, 1980), No. 78-2200, wherein this Court held that an award of attorney's fees in a dissolution of marriage could only be made where the Wife had a need.

that the same Statute § 61.16 that governs trial expenses governs appellate expenses. Yet the burden of one is transferred from the Wife to the Husband but the other is not.(21) The rule of law applied to the facts of the instant case constitutionally requires a holding that the Wife discharge her obligation to pay both.

The Court's reversal of the finding of special equity and the order directing the Husband to reimburse the Wife for the counsel fees she has already paid with respect to only proceedings below will create no equitable imbalance and will set straight what otherwise would be a lack of procedural and substantive due process of law.

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(21) This Court's disallowance of an attorney's fees to the Wife on appeal.

Summary of What Has Been Overlooked

The Court's per curiam affirmance in the case of the Husband's appeal (No. 79-2143) has overlooked:

1. In regard to the Husband's New York properties (both real and personal) that there is no basis in the record (under the standard of evidence required to be submitted) to support the award of arbitrary 40% in his New York titled real properties (Sands Point and Parker) nor a 50% interest in the balance of his titled New York personal property.

The claimed special equity has not been proved beyond either reasonable doubt[22] or by clear, convincing and unambiguous evidence. None of the evidence presented by the Wife that she,

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(22) Lindley v. Lindley, 84 So.2d 17 (Fla. 1955).

or her parents, had contributed any monies toward the purchase of the New York properties meets the evidentiary tests. To draw such conclusions, one must engage in speculation and surmise. This type testimony does not rise to the requirement of evidence "beyond a reasonable doubt" nor is it "clear, convincing and unambiguous" evidence.

2. In any event, the only evidence presented to the trial court was documentary evidence stolen from the Husband. At the beginning of the trial, the Wife testified that she had no evidence to prove a special equity. Later in the case her counsel produced stolen documents admitted over objection. While it is the Husband's position that these documents properly construed did not establish a special equity, they should not

have been allowed into evidence[23].

3. Finally, the property in which a special equity was awarded is New York property. This state has no jurisdiction over New York properties. New York is a title state. Under New York Law title to the property is, and always has been, in the Husband's sole name. The Husband's New York Under New York Law title to the property is, and always has been, in the Husband's sole name. The Husband's New York property does not lose its character simply because the Husband moved to Florida. The wife did not move to Florida. The U.S. Constitution decrees that the Husband's New York titled real or personal property cannot be di-

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(23) Williams v. Williams, 221 N.E. 2d 622 (Ohio, Common Pleas, 1966); Kohn v. Superior Court, 12 Cal.App.2d 459, 55 P.2d 1186 (Cal. 1936).

vested upon his moving to Florida[24]. There is no basis in the record for awarding the Wife approximately 75% of the parties' New York personal property. Even in a community property state, the Husband would have been entitled to one-half. Under New York law, where the personal property has been paid for by the Husband[25], the property is his[26].

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(24) In Re Marriage Of Roesch, 147 Cal.Rptr. 586, 83 Ca.App.3d 96 (Cal.App.).

(25) P.Ex.No. 13 shows Mr. Ohl's personal check No. 300 dated May 17, 1952 to the order of the Parke-Bernet Galleries, Inc., for $7,810.75 drawn on the Morgan Guaranty Trust Company of New York and his bank statement shows after payment of this check his balance was $38,725. The identification of the items of personal property in this instance is resolved by the description in the invoice with reference numbers in the catalogue of the La Rouchefoucould collection. Even after 27 years, documentary evidence was produced at the Trial (P. Ex. 13) which is irrefutable (Cf. T. p. 321).

(26) Manheim v. Manheim, 60 Misc.2d 88, 302 N.Y.S.2d 473 (Supp.Ct. Nassau County 1969), aff'd, 310 N.Y.S.2d 1017.

WHEREFORE, the Husband requests this Court to grant a rehearing in this cause by reason of the above factors and to reverse the awarding of a special equity and the order requiring the Husband to reimburse the Wife's counsel fees paid to her trial counsel.

PETITION FOR CERTIFIED QUESTION

Alternatively, the Husband requests this Court to certify the following questions to the Florida Supreme Court as being ones of great public interest:

POINT I

WHETHER CONSTITUTIONAL CONSIDERATIONS REQUIRE THAT IN A DISSOLUTION OF MARRIAGE IN FLORIDA, NEW YORK LAW BE APPLIED TO PROPERTY (REAL AND PERSONAL) LOCATED IN NEW YORK WHERE UNDER NEW YORK LAW THE HUSBAND WOULD BE ENTITLED TO THE PROPERTY, BUT WHERE THE HUSBAND NOW RESIDES IN FLORIDA AND THE WIFE RESIDES IN THE CAYMAN ISLANDS?

POINT II

WHETHER CONSTITUTIONAL CONSIDERATIONS REQUIRE THAT DOCUMENTS WHICH THE WIFE STOLE FROM THE HUSBAND ARE INADMISSIBLE IN EVIDENCE IN A DISSOLUTION OF MARRIAGE ACTION?

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been mailed to: H. L. COOPER, JR., P. O. Box 3917, West Palm Beach, FL 33402, this 24th day of DECEMBER, 1980.

PAXTON, CROW, TAPLIN & BRAGG
Suite 600-Forum III
1655 Palm Beach Lakes Blvd.
West Palm Beach, FL 33401

and

EDNA L. CARUSO
Suite 1007-Forum III
1655 Palm Beach Lakes Blvd.
West Palm Beach, FL 33401
305-686-8010
Attorneys for Appellee/Cross-Appellant

By_____for
NORMAN E. TAPLIN

DECISION OF THE FOURTH DISTRICT COURT OF APPEAL DATED JANUARY 16, 1981 DENYING PETITIONER'S PETITION FOR REHEARING.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FOURTH DISTRICT

LILLIAN M. OHL,

Appellant,

v.

CASE NO. 79-2123 and 79-2143

JOHN P. OHL,

Appellee.

January 16, 1981

BY ORDER OF THE COURT:

ORDERED that Appellee/Cross-Appellant's December 24, 1980 Petition for Rehearing and Petition to Certify Questions to the Florida Supreme Court are hereby denied; and further,

ORDERED that Appellant's December 24, 1980 Motion for Rehearing is hereby denied.

I hereby certify the foregoing is a true copy of the original court order.

CLYDE L. HEATH,
CLERK

cc: O'Connell, Cooper, Parrish & McBane, P.A.
Norman E. Taplin, Esq.
Edna L. Caruso, Esq.

PETITION TO INVOKE DISCRETIONARY JURISDICTION OF FLORIDA SUPREME COURT IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FOURTH DISTRICT

CASE NO.: 79-2123
79-2143

LILLIAN M. OHL,

Appellant/Cross-Appellee,

v.

JOHN P. OHL,

Appellee/Cross-Appellant.

NOTICE TO INVOKE DISCRETIONARY JURISDICTION

NOTICE IS HEREBY GIVEN that JOHN P. OHL, invokes the discretionary jurisdiction of the Supreme Court to review the decision of this Court dated December 10, 1980, Petitions for Rehearing denied January 16, 1981.

The decision directly and expressly conflicts with decisions of other Dis-

trict Courts of Appeal and of the Supreme Court of Florida which expressly construes Article 1, Sections 2, 9 and 12 of the Constitution of the State of Florida and the IV, V and XIV (Section 1) Amendments to the United States Constitution in a manner which is contrary to decisions of the Supreme Court of the United States in the following respects:

1. Denies Petitioner (Husband) the equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States as construed B in Orr v. Orr, 440 U.S. 268 (decided March 5, 1979) (Alabama); Childs v. Childs, 440 U.S. 952 (March 19, 1979) (New York); and Loyacano v. LeBlanc, 440 U.S. 952 (March 19, 1979) (Louisiana) to make it unconstitutional to order the Husband to pay his Wife's counsel fees and her Court costs where the Wife is indisputedly

worth over two million dollars and has been found to have sufficient income for her support by reason the Trial Court's finding the Wife had no need and its denial of alimony to her in any form. 1-B

2. Denies Petitioner due process of law and equal protection of the law guaranteed by the Fourteenth Amendment to the United States Constitution as construed for example In Re Marriage of Roesch, 147 Cal.Reptr. 586, 83 Cal.App.3d 96 (Cal.App. 1978), to make it unconstitutional to take the Husband's property (real and personal) titled solely in him under the laws of New York where the properties always have been located and where the parties (Husband and Wife) separated in a Florida divorce proceeding wherein the Wife was held not to be entitled to alimony in any form.

3. Denies Petitioner due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States and his right to be "secure" in his "papers and effects" against "Seizures" under the Fourth Amendment as construed in Mapp v. Ohio, 367 U.S. 643 (1961) (in a criminal case) but required in civil cases as well, Williams v. Williams, 221 N.E.2d 622 (Common Pleas, 1966) and Kohn v. Superior Court, 12 Cal. App.2d 459, 55 P. 2 1186 (1936); See Elkins v. United States, 364 U.S. at p. 217 particularly as the stolen evidence is the only evidence presented by the Wife in support of her claim to the Husband's New York property, she having orally testified she had no proofs.

4. Denies Petitioner substantive and procedural due process of law rights guaranteed by the Fourteenth Amendment to

the United States Constitution C in that the Trial and Appellate Courts have failed to specify any ground or reason for their Order requiring the Husband to turn over his New York properties to the Wife, thus unconstitutionally taking his properties in an arbitrary manner.

I HEREBY CERTIFY that a copy of the foregoing has been mailed to: Larry Cooper, Esquire, Post Office Box 3917, West Palm Beach, Florida, 33402, this 16th day of February, 1981.

PAXTON, CROW, TAPLIN & BRAGG, P.A.
1655 Palm Beach Lakes Boulevard
Suite 600
West Palm Beach, Florida 33401
Telephone: 305-684-2121

and

EDNA L. CARUSO
1655 Palm Beach Lakes Boulevard
Suite 1007
West Palm Beach, Florida 33401
Telephone: 305-686-8010

Attorneys for JOHN P. OHL

BY: _____
NORMAN E. TAPLIN

DECISION OF FLORIDA SUPREME COURT RULING THAT IT HAS NO JURISDICTION TO REVIEW THE FOURTH DISTRICT COURT OF APPEAL'S DECISION

IN THE SUPREME COURT OF FLORIDA

WEDNESDAY, FEBRUARY 25, 1981

JOHN P. OHL,	**	
Petitioner,	**	CASE NO. 60,288
vs.	**	District Court of Appeal, 4th District - Nos. 79-2123 & 79-2143
LILLIAN M. OHL,	**	
Respondent.	**	

It appearing to the Court that it is without jurisdiction, the Petition for Review is hereby dismissed. Jenkins v. State, 385 So.2d 1356 (Fla. 1980).

No Motion for Rehearing will be entertained by the Court.

A True Copy C

TEST:

cc: Hon. Clyde L. Heath,
Clerk
Hon. John B. Dunkle,
Clerk
Hon. Thomas E. Sholts,
Judge

Norman E. Taplin, Esquire of
Paxton, Crow, Taplin & Bragg
Edna L. Caruso, Esquire
Larry Cooper, Esquire

Sid J. White
Clerk Supreme Court

By: /s/ Debbie Causseaux
Deputy Clerk

Statutory Appendix

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U.S. Constitution, Fourth Amendment 1b

U.S. Constitution, Fourteenth Amendment, Section One 1b

Florida Stat. Ann. § 61.16 . . . . . 2b

UNITED STATES CONSTITUTION, ARTICLE FOUR, SECTION TWO:

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several states.

UNITED STATES CONSTITUTION, FOURTH AMENDMENT:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, SECTION 1:

All persons born or naturalized in

the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FLORIDA STATUTES ANNOTATED, SECTION 61.16:

The court may from time to time, after considering the financial resources of both parties, order a party to pay a reasonable amount for attorney's fees, suit money, and the cost to the other party of maintaining or defending any proceeding under this chapter, including enforcement and modification proceedings.

The court may order that the amount be paid directly to the attorney, who may enforce the order in his name.